

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILLIAM WOMACK,

Plaintiff,

V.

L ADAMS, KEVIN BOVENKAMP, B BRAID, CHRIS BOWMAN, STEPHEN FLEENOR, JOHN/JANE DOES, ROY GONZALEZ, LIZA ROHRER, STEVEN SINCLAIR, SUNDBERG, THURSTON COUNTY, THOMAS VICARI, WASHINGTON DEPARTMENT OF CORRECTIONS.

Defendants.

CASE NO. 3:15-CV-05249-RBL-DWC

**ORDER TO SHOW CAUSE OR
AMEND**

Plaintiff William Womack, proceeding *pro se* and *in forma pauperis*, filed this civil

rights complaint under 42 U.S.C. § 1983. Having reviewed and screened Plaintiff's Complaint under 28 U.S.C. § 1915A, the Court declines to serve Plaintiff's Complaint but provides Plaintiff leave to file an amended pleading by July 11, 2015, to cure the deficiencies identified herein.

BACKGROUND

23 Plaintiff, who is currently incarcerated at Washington State Penitentiary (“WSP”), alleges
24 he was not provided with eyeglasses at Shelton Correctional Center (“SCC”) because his 20/60

1 vision was “too good.” Dkt. 8, p. 6. Plaintiff states he was transferred to WSP in April of 2012.
2 Dkt. 8. He maintains Defendants Sergeant Roop and Correctional Unit Supervisor Adams failed
3 to protect Plaintiff from an inmate assault. *Id.* Plaintiff also alleges his right of access to the
4 courts was violated and he was subjected to cruel and unusual conditions of confinement. *Id.*
5 Further, Plaintiff contends Defendant Thomas Vicari retaliated against Plaintiff by conducting an
6 unwarranted search of Plaintiff’s cell.

7 **DISCUSSION**

8 Under the Prison Litigation Reform Act of 1995, the Court is required to screen
9 complaints brought by prisoners seeking relief against a governmental entity or officer or
10 employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must “dismiss the
11 complaint, or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to
12 state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant
13 who is immune from such relief.” *Id.* at (b); 28 U.S.C. § 1915(e)(2); *see Barren v. Harrington*,
14 152 F.3d 1193 (9th Cir. 1998).

15 In order to state a claim for relief under 42 U.S.C. § 1983, a plaintiff must show: (1) he
16 suffered a violation of rights protected by the Constitution or created by federal statute, and (2)
17 the violation was proximately caused by a person acting under color of state law. *See Crumpton*
18 *v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The first step in a § 1983 claim is therefore to
19 identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271
20 (1994). To satisfy the second prong, a plaintiff must allege facts showing how individually
21 named defendants caused, or personally participated in causing, the harm alleged in the
22 complaint. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

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1 Plaintiff's Complaint suffers from deficiencies requiring dismissal if not corrected in an
 2 amended complaint.

3 **A. Statute of Limitations**

4 A complaint must be timely filed. The Civil Rights Act, 42 U.S.C. § 1983, contains no
 5 statute of limitations. "Thus, the federal courts [] apply the applicable period of limitations
 6 under state law for the jurisdiction in which the claim arose." *Rose v. Rinaldi*, 654 F.2d 546, 547
 7 (9th Cir. 1981). In *Rose*, the Ninth Circuit determined the three year limitations period identified
 8 in Revised Code of Washington 4.16.080(2) is the applicable statute of limitations for § 1983
 9 cases in Washington. 654 F.2d at 547; *see RCW 4.16.080(2)*.

10 The Court also applies the forum state's law regarding equitable tolling for actions
 11 arising under § 1983. *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004). In Washington, courts
 12 permit equitable tolling "when justice requires." *Millay v. Cam*, 135 Wash.2d 193, 206 (1998).
 13 "The predicates for equitable tolling are bad faith, deception, or false assurances by the
 14 defendant and the exercise of diligence by the plaintiff." *Id.* Courts "typically permit equitable
 15 tolling to occur only sparingly, and should not extend it to a garden variety claim of excusable
 16 neglect." *State v. Robinson*, 104 Wash.App. 657, 667 (2001) (internal quotations omitted).

17 Although the statute of limitations is an affirmative defense which normally may not be
 18 raised by the court *sua sponte*, it may be grounds for *sua sponte* dismissal of an *in forma
pauperis* complaint where the defense is complete and obvious from the face of the pleadings or
 19 the court's own records. *See Franklin v. Murphy*, 745 F.2d 1221, 1228–30 (9th Cir. 1984).

21 Plaintiff alleges an unnamed individual at SCC denied him eyeglasses on January 21,
 22 2012. Dkt. 8, p. 6. Thus, Plaintiff had actual notice of the facts relating to this claim on that date.
 23 *See id.; Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir. 1996) (a claim accrues when the plaintiff
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1 knows or has reason to know of the injury which is the basis of the action). The time for filing
2 the Complaint regarding this claim therefore expired on January 21, 2015. Plaintiff signed--
3 effectively filing--this Complaint on April 15, 2015, more than two months after the statute of
4 limitations ran. Further, Plaintiff has failed to plead facts to support equitable tolling of this
5 claim. Plaintiff must show cause as to why this claim should not be dismissed based on the
6 expiration of the statute of limitations.

7 The Court also notes Plaintiff has failed to identify who denied him eyeglasses and how
8 he was harmed by not having eyeglasses at SCC. *See* Dkt. 8. If Plaintiff can overcome the statute
9 of limitations, he must name specific individuals as defendants and must allege in more specific
10 terms who harmed him and how the harm violated a specific constitutional right.

11 **B. Eighth Amendment**

12 *1. Failure to Protect*

13 Plaintiff maintains he told Defendant Roop in February of 2013 he had concerns about
14 his safety at WSP. Dkt. 8, p. 7. Defendant Roop planned a meeting with Defendant Adams, and
15 during the meeting Defendant Adams offered to place Plaintiff in administrative segregation. *Id.*
16 Plaintiff declined because he viewed administrative segregation as “punishment” and he needed
17 to have the ability to do his legal work, which would not have been available to him in
18 administrative segregation. *Id.* Plaintiff alleges he was assaulted by another inmate on February
19 22, 2013. *Id.* Plaintiff maintains unnamed Washington Department of Corrections (“DOC”)
20 employees wrote falsified reports stating Plaintiff was the aggressor. *Id.* at p. 8. After a hearing,
21 it was determined Plaintiff was the victim, and Plaintiff was allegedly placed in administrative
22 segregation at the request of Defendant Adams.

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1 The Eighth Amendment requires prison officials to take reasonable measures to
2 guarantee the safety of prisoners. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Prison officials
3 have a duty to protect prisoners from violence suffered at the hands of other prisoners. *Id.* at 833.
4 However, not every injury suffered by a prisoner at the hands of another is a violation of a
5 prisoner's constitutional rights. *Id.* at 834.

6 In cases alleging an Eighth Amendment violation based on a failure to prevent harm, the
7 plaintiff must first meet an objective component by showing "he is incarcerated under conditions
8 posing a substantial risk of serious harm." *Id.*; see *Clouthier v. County of Contra Costa*, 591 F.3d
9 1232, 1242 (9th Cir. 2010). The plaintiff must also meet a subjective component by showing the
10 prison official acted with deliberate indifference to inmate health or safety. *Farmer*, 511 U.S. at
11 834; *Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("[A] claim that a prisoner's confinement
12 violate[s] the Eighth Amendment requires an inquiry into the prison officials' state of mind.").
13 "[A] prison official cannot be found liable under the Eighth Amendment . . . unless the official
14 knows of and disregards an excessive risk to inmate health or safety; the official must both be
15 aware of facts from which the inference could be drawn that a substantial risk of serious harm
16 exists, and he must also draw the inference." *Farmer*, 511 U.S. at 832; see *Wallis v. Baldwin*, 70
17 F.3d 1074, 1077 (9th Cir. 1995). A prison "official's failure to alleviate a significant risk he
18 should have perceived but did not," therefore, cannot "be condemned as the infliction of
19 punishment." *Farmer*, 511 U.S. at 838.

20 Plaintiff alleges he told Defendants Roop and Adams he was concerned for his safety.
21 Plaintiff states Defendant Roop informed Defendant Adams, who in turn offered to place
22 Plaintiff in administrative segregation to protect him. Plaintiff declined. After Plaintiff was
23 assaulted, Defendant Adams arranged for Plaintiff to be placed in administrative segregation.
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1 The Complaint fails to allege facts showing Defendants Roop and Adams acted with deliberate
2 indifference to an objectively serious risk of harm faced by Plaintiff; rather, the Complaint shows
3 they offered Plaintiff protective housing and placed him in protective housing after he was
4 assaulted. To successfully state a claim, Plaintiff must allege more specific factual allegations
5 showing how Defendants Roop and Adams violated Plaintiff's Eighth Amendment rights.

6 2. Conditions of Confinement

7 Plaintiff also alleges, while housed at WSP, he has been subjected to conditions of
8 confinement which violate his Eighth Amendment rights. *See* Dkt. 8, pp. 10-11. Specifically,
9 Plaintiff maintains he is forced to live in a 60 square foot cell with a toilet without a lid, is forced
10 to breathe dirt and filth, and is unable to shave properly due to inadequate mirrors and a lack of
11 glasses. *Id.*

12 The Constitution does not mandate comfortable prisons, but neither does it permit
13 inhumane prisons. *Farmer*, 511 U.S. at 832. Under the Eighth Amendment, prison officials are
14 required to provide prisoners with basic life necessities, such as food, clothing, shelter,
15 sanitation, medical care, and personal safety. *Id.* "To violate the Cruel and Unusual Punishments
16 Clause, a prison official must have a sufficiently culpable state of mind." *Id.* at 834 (internal
17 quotations omitted). "In prison-conditions cases that state of mind is one of 'deliberate
18 indifference' to inmate health or safety[.]" *Id.* (*quoting Wilson v. Seiter*, 501 U.S. 294, 302-03
19 (1991)).

20 Plaintiff has failed to allege facts showing the conditions he complains of rise to the level
21 of "inhumane." Further, Plaintiff has not identified any individuals who have acted with
22 deliberate indifference and subjected Plaintiff to conditions which rise to the level of cruel and
23 unusual punishment. Plaintiff must allege facts showing he faced inhumane conditions of
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1 confinement, and must allege in more specific terms who harmed him and how the harm violated
 2 his Eighth Amendment rights.

3 **C. Access to Courts**

4 Plaintiff alleges he was denied access to the courts when he was placed in administrative
 5 segregation after being assaulted. Dkt. 8, pp. 8-10. Plaintiff maintains he was forced to submit a
 6 hand written motion for extension of time in a case, lost time researching his criminal action, was
 7 forced to use inadequate and out-of-date legal supplies, and was unable to type his legal
 8 documents. *Id.*

9 Inmates have a “fundamental constitutional right of access to the courts.” *Bounds v.*
 10 *Smith*, 430 U.S. 817, 828 (1977). In *Bounds*, the Supreme Court held the right of access imposes
 11 an affirmative duty on prison officials to assist inmates in preparing and filing legal papers,
 12 either by establishing an adequate law library or by providing adequate assistance from persons
 13 trained in the law. *Id.* at 828. In *Lewis v. Casey*, 518 U.S. 343 (1996), the Supreme Court held a
 14 prisoner must show some actual injury resulting from a denial of access in order to allege a
 15 constitutional violation. *Id.* at 349.

16 To establish he suffered an actual injury, Plaintiff must show “actual prejudice with
 17 respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to
 18 present a claim.” *Lewis*, 518 U.S. at 348; *Christopher v. Harbury*, 536 U.S. 403, 415, (2002);
 19 *Nevada Dep’t of Corr. v. Greene*, 648 F.3d 1014, 1018 (9th Cir. 2011); *Phillips v. Hurst*, 588
 20 F.3d 652, 655 (9th Cir. 2009). The right of access to the courts is limited to non-frivolous direct
 21 criminal appeals, habeas corpus proceedings, and Section 1983 cases. See *Lewis*, 518 U.S. at 353
 22 n. 3, 354-55. “Failure to show that a ‘nonfrivolous legal claim has been frustrated’ is fatal to [an

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1 access to courts] claim.” *Alvarez v. Hill*, 518 F.3d 1152, 1155 n. 1 (9th Cir. 2008) (*quoting*
 2 *Lewis*, 518 U.S. at 353 & n. 4).

3 Plaintiff has not alleged any actual injury in his Complaint. There are no allegations
 4 Plaintiff was denied access to the courts in a non-frivolous direct criminal appeal, habeas corpus
 5 proceeding, or § 1983 case, nor are there allegations showing Plaintiff had a legal claim
 6 frustrated by the actions of WSP officials. *See Exmundo v. Kevorkian*, 2009 WL 3416236, *3
 7 (E.D. Cal. Oct. 22, 2009) (finding the plaintiff did not state an access claim when he alleged he
 8 had to secure extensions and speculated the outcome of a case may have been different had he
 9 been able to litigate more effectively). Further, Plaintiff fails to identify any Defendant whom
 10 allegedly violated Plaintiff’s right of access to the courts. To succeed on an access to the courts
 11 claim, Plaintiff must name specific individuals as defendants and must allege in more specific
 12 terms who harmed him and how the harm violated his right of access to the courts.

13 **D. Retaliation**

14 Plaintiff alleges Defendant Thomas Vicari retaliated against Plaintiff by performing an
 15 unwarranted cell search. Dkt. 8, p 11. During the allegedly retaliatory search, Defendant Vicari
 16 “went through [P]laintiff’s legal paperwork,” broke Plaintiff’s light “more,” and took Plaintiff’s
 17 typewriter correctional tape and pills. *Id.* at pp. 11-12.

18 To prove a First Amendment claim of retaliation under § 1983, Plaintiff must show: (1)
 19 he was subjected to adverse action; (2) the adverse action was imposed because of certain
 20 conduct; (3) the conduct giving rise to the adverse action is legally protected; (4) the adverse
 21 action chilled the prisoner’s speech; and (5) the adverse action did not advance a legitimate
 22 penological goal. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005). In addition, the
 23 plaintiff must show retaliation was the substantial or motivating factor behind the conduct of the
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1 prison official. *See Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-87 (1977);
 2 *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009).

3 Plaintiff has not sufficiently alleged facts supporting a claim of retaliation. For example,
 4 Plaintiff has not alleged the search was in retaliation for Plaintiff engaging in legally protected
 5 conduct or alleged the search chilled his speech. Plaintiff must provide more specific facts
 6 showing how Defendant Vicari's actions constituted retaliation and violated Plaintiff's
 7 constitutional rights.

8 **E. Claim Against Thurston County**

9 Plaintiff generally alleges Thurston County failed to train law enforcement officers and
 10 failed to adopt and implement policies for inmates. Dkt. 8, p. 13. Thurston County, a
 11 municipality, is subject to suit under § 1983. *Monell v. New York City Dept. of Social Services*,
 12 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). To set forth a claim against a
 13 municipality, a plaintiff must show the defendant's employees or agents acted through an official
 14 custom, pattern, or policy permitting deliberate indifference to, or violating, the plaintiff's civil
 15 rights, or that the entity ratified the unlawful conduct. *Id.* at 690-91. A plaintiff must show (1)
 16 deprivation of a constitutional right; (2) the municipality has a policy; (3) the policy amounts to
 17 deliberate indifference to a plaintiff's constitutional rights; and (4) the policy is the moving force
 18 behind the constitutional violation. *See Oviatt v. Pearce*, 954 F.3d 1470, 1474 (9th Cir. 1992).

19 Plaintiff has not alleged facts against Thurston County showing it is liable. For example,
 20 Plaintiff does not provide the policy, custom, or pattern implemented by Thurston County which
 21 resulted in the depravation of a constitutional right. Further, it does not appear the facts giving
 22 rise to the allegations contained in the Complaint took place in Thurston County. Plaintiff must

1 allege facts sufficient to meet the required elements of a claim against a municipality and show
 2 Thurston County violated his constitutional rights.

3 **F. Supervisory Liability**

4 Plaintiff names several Defendants (Kevin Bovenkamp, B. Braid, Chris Bowman,
 5 Stephen Fleenor, Roy Gonzalez, Liza Rohrer, Steven Sinclair, and C.S. Sundberg) and maintains
 6 these Defendants are liable because they are in some type of supervisory position or position of
 7 responsibility. *See Dkt. 8, pp. 3-4.* Section 1983 supervisory liability cannot be based on
 8 *respondeat superior. See Monell v. New York City Dep’t of Social Servs., 436 U.S. 658, 691*
 9 (1978). A § 1983 action may not be brought against a supervisor on a theory that the supervisor
 10 is liable for the acts of his or her subordinates. *See Polk County v. Dodson, 454 U.S. 312, 325*
 11 (1981). Further, to state a claim against any individual Defendant, Plaintiff must allege facts
 12 showing the individual Defendant participated in or directed the alleged violation, or knew of the
 13 violation and failed to act to prevent it. *See Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir.*
 14 1998), cert. denied, 525 U.S. 1154 (1999). Because vicarious liability is inapplicable to a § 1983
 15 suit, Plaintiff must plead each Government-official Defendant, through the official’s own
 16 individual actions, has violated the Constitution. *Ashcroft v. Iqbal, 556 U.S. 662 (2009).*

17 Plaintiff has failed to allege facts showing Defendants Bovenkamp, Braid, Bowman,
 18 Fleenor, Gonzalez, Rohrer, Sinclair, and Sundberg participated in or directed subordinates to
 19 commit the alleged violations. Plaintiff must allege in specific terms how these eight Defendants
 20 harmed him and how those harms violated a specific constitutional right.

21 **G. Improper Defendants**

22 Plaintiff names the Washington State Department of Corrections (“DOC”) as a
 23 Defendant. Dkt. 8, p. 7. Section 1983 applies to the actions of “persons” acting under the color
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1 of state law. The DOC, as an arm of the state of Washington, is not a “person” for purposes of a
2 § 1983 civil rights action. *See Will v. Michigan Dep’t. of State Police*, 491 U.S. 58, 65, 71
3 (1989). Additionally, there is no evidence the state of Washington has waived its Eleventh
4 Amendment immunity in federal courts. Therefore, the DOC is a state agency which cannot be
5 sued under § 1983.

6 Plaintiff identifies John/Jane Doe 1-6 as Defendants in this action. The use of “John Doe”
7 to identify a defendant is not favored. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980).
8 Although a plaintiff may be given an opportunity after filing a lawsuit to discover the identity of
9 unknown defendants through discovery, the use of Doe defendants is problematic because those
10 persons cannot be served with process until they are identified by their real names. If filing an
11 amended complaint, Plaintiff shall attempt to provide the names of Defendants identified as
12 John/Jane Doe.

13 **H. Venue**

14 Plaintiff provides only two conclusory allegations regarding events arising in the Western
15 District of Washington (claims against Thurston County and an unnamed employee of SCC).
16 Plaintiff resides in Walla Walla, Washington at WSP, which is located in the Eastern District of
17 Washington. The majority of the events giving rise to this case occurred at WSP. If Plaintiff fails
18 to state a claim as to Defendants residing in or events occurring in the Western District of
19 Washington, the Eastern District of Washington will be the only proper venue to hear this case.
20 Plaintiff must show cause as to why his Complaint should not be dismissed without prejudice as
21 to his right to refile a complaint containing only claims arising in the Western District of
22 Washington.

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1 If Plaintiff intends to pursue a § 1983 civil rights action in this Court, he must file an
2 amended complaint and within the amended complaint, he must write a short, plain statement
3 telling the Court: (1) the constitutional right Plaintiff believes was violated; (2) the name of the
4 person who violated the right; (3) exactly what the individual did or failed to do; (4) how the
5 action or inaction of the individual is connected to the violation of Plaintiff's constitutional
6 rights; and (5) what specific injury Plaintiff suffered because of the individual's conduct. *See*
7 *Rizzo v. Goode*, 423 U.S. 362, 371–72, 377, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976).

8 Plaintiff shall present the amended complaint on the form provided by the Court. The
9 amended complaint must be legibly rewritten or retyped in its entirety, it should be an original
10 and not a copy, it should contain the same case number, and it may not incorporate any part of
11 the original complaint by reference. The amended complaint will act as a complete substitute for
12 the original Complaint, and not as a supplement. The Court will screen the amended complaint to
13 determine whether it contains factual allegations linking each defendant to the alleged violations
14 of Plaintiff's rights. The Court will not authorize service of the amended complaint on any
15 defendant who is not specifically linked to the violation of Plaintiff's rights.

16 If Plaintiff fails to file an amended complaint or fails to adequately address the issues
17 raised herein on or before July 11, 2015, the undersigned will recommend dismissal of this
18 action as frivolous pursuant to 28 U.S.C. § 1915.

19 The Clerk is directed to send Plaintiff the appropriate forms for filing a 42 U.S.C. § 1983
20 civil rights complaint and for service. The Clerk is further directed to send copies of this Order
21 and Pro Se Instruction Sheet to Plaintiff.

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1 Dated this 11th day of June, 2015.

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David W. Christel
United States Magistrate Judge